FOR ARGUMENT

(6)

No. 89-1008

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

DWIGHT H. OWEN

Petitioner

vs

HELEN OWEN

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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SUMMARY OF ARGUMENT

I. The Respondent/Creditor suggests that a state may limit its homestead exemption so as to preserve a judicial lien despite 11 USC 522(f)(1). The Petitioner/Debtor argues that such a position can not be sustained consistent with the language and legislative history of the Code. The construction placed upon that Code provision by the Creditor is contrary to appropriate principals of statutory interpretation.

II. The Respondent/Creditor also argues that the reasoning of United States v Security Industrial Bank 459 US 70 (1982) should be applied to this case and that lien avoidance would produce improper retroactive application of law. The Petitioner/Debtor argues that the issue of retroactivity does not arise and that factual differences between the instant

case and United States v Security Industrial Bank, above, render that case inapplicable to the issues and interests involved here.

ARGUMENT

The Respondent poses two questions in the answer brief for the Respondent.

1. WHETHER, UNDER SECTION 522 OF THE BANKRUPTCY CODE - WHICH AUTHORIZES THE STATES TO ESTABLISH CATEGORIES OF EXEMPT PROPERTY FOR PURPOSES OF BANKRUPTCY - A STATE MAY LIMIT ITS HOMESTEAD EXEMPTION SO AS TO PRESERVE A JUDICIAL LIEN.

The Debtor in this case is accorded only the exemptions provided by Florida law[1]. Florida did not alter its exemption provisions in response to the enactment of the Code and did not create any separate class of exemptions for bankruptcy purposes[2]. By virtue of the amended homestead exemption which became effective

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1. Chapter 222.20, Florida Statutes. (JA 16).

2. Id.

on 8 January 1985, the Debtor was entitled to that exemption when his Chapter 7 petition was filed on 13 January 1986 and the Bankruptcy court so determined[3]. The Creditor's judgment lien, which attached to the Debtor's property prior to the entitlement to the exemption remains, under Florida law, enforceable against the homestead right which the Debtor subsequently achieved[4]. Such an exemption limitation is not objectionable solely as a matter of state law and the Code does not purport to upset this as state policy[5]: This is not to say that those

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3. See In Re Owen, Order on Objection to Claim of Exempt Property, United States Bankruptcy Court, Middle District of Florida, Tampa Division, Case No. 86-106, at p. 3-4, August 13, 1986.(JA1). In Re Zahn, 605 F 2d 323 (7th Cir 1979) cert den 444 US 1075 (1980).

4. B. A. Lott, Inc. v Padgett, 14 So 2d 667 (Fla 1943).

5. 11 USC 522(b)(2)(A).

state exemptions are immune from other provisions of the Code. The Creditor contends that this particular state law limitation or "exemption exception" must also be effective to preclude operation of 11 USC 522(f)(1).[6]

The inquiry, however, does not end with a mere determination of state exemption law. Once the Debtor has invoked the provisions of the bankruptcy laws by filing his petition, an independent body of Federal law must be applied. Creditor

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6. R. Br. at 22-25. This is the issue about which the circuits have disagreed. In Re Pine, 717 F 2d 281 (6th Cir 1983) cert den 466 US 928 (1984) and In Re McManus, 681 F 2d 353 (5th Cir 1982) have adopted the view that state law may limit lien avoidance under 11 USC 522(f)(1) in this way. In Re Hall, 752 F 2d 582 (11th Cir 1985), In Re Leonard, 866 F 2d 335 (10th Cir 1989) and In Re Snow, 899 F 2d 337 (4th Cir 1990) have taken the view that state law definitions remain subject to an independent application of 11 USC 522(f). A number of Courts have expressly recognized this conflict, including In Re Bessent, 831 F 2d 82 (5th Cir 1987), In Re Pelter, 64 BR 492 (Bankr WD Okla 1986), Dominion Bank of the Cumberlands NA v Nuckolls, 780 F 2d 408 (4th Cir 1985)(concurring opinion).

essentially contends that state lien preservation is effective to deprive this Debtor of lien avoidance under the Code.[7] This view of the balance of state and Federal law can not be supported, for various reasons, and should not be adopted by this Court.

First, the plain language of the Code does not support the contention that the power of the state to define exemptions includes the power to preclude operation of 11 USC 522(f).[8] There exists no "state option" under subsection (f).[9] Similarly,

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7. R. Br. at 22-28. This is the view taken by the 5th and 6th Circuits. This was also the view taken by the Court of Appeals below at 877 F 2d 44, 47 (A8).

8. Various courts have found lien avoidance to be available on this basis. See In Re Hall, above, In Re Storer, 13 BR 1 (Bankr SD Ohio 1980), and In Re Taylor, 73 BR 149 (9th Cir BAP 1987) affirmed 861 F 2d 550 (9th Cir 1988).

9. See In Re Jackson, 55 BR 343 (Bankr MD NC 1985), In Re Wilson, 51 BR 16 (Bankr SD Ind 1984), In Re Barto, 8 BR 145 (Bankr ED VA 1981), and In Re Pelter, above.

the reference to judicial lien found in subsection (f) is unqualified and unconditioned.[10] For this Court to sustain the Creditor's position, this Court would be required to broaden state authority under 11 USC 522(b) and narrow the role of 11 USC 522(f). The language of neither supports such a result and it would not be within the proper role of this Court to permit it.[11]

Second, like the code provisions, the legislative history offers no support

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10. Lien avoidance has been permitted where, by state law, the lien acquired priority over the exemption. See In Re Lawery, 57 BR 104 (Bankr MD Ala 1985), In Re Baxter, 19 BR 674 (9th Cir BAP 1982), In Re Dahdah, 20 BR 665 (9th Cir BAP 1982), In Re Hershey, 50 BR 329 (DC SD Fla 1985).

11. As a principal of Statutory construction, it is inappropriate for this Court to imply terms or conditions which Congress did not include in the statute. See Fedorenko v United States, 449 US 490, 513 (1981) ("We are not at liberty to imply a condition which is opposed to the explicit terms of the statute..."), United States v Cooper Corporation et al, 312 US 600, 605 (1940) ("But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made.").

for the restrictions on subsection (f) suggested by the Creditor.[12] To the contrary, the reference to judicial liens quite clearly indicate that the limitations suggested by the Creditor were not intended.

Third, Florida's "opt out" provision

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12. Quoting in part from In Re Snow, 899 F 2d at 339, the following appears
"Both the House and Senate versions of the bill that became the lien avoidance section, §522(f), allow liens to be avoided, 'to the extent the property could have been exempted in the absence of the lien...' H.R. Rep. No. 595, 95th Cong. 1st Sess. 362 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6318; S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5862. The legislative history illustrates the concern which the law was designed to address by stating:
'The bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may avoid any judicial lien on exempt property, and any nonpurchase money security interest in certain exempt property such as household goods..."(Omissions suppied). H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 127 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 6087-88.
See also Garcia v United States, 469 US 70,75 (1984)

refers only to subsection (d) regarding exemptions.[13] It does not refer to subsection (f) and thus does not attempt to limit or avoid that section.[14]

Fourth, the validation of state authority to evade 11 USC 522(f) by way of exemption exceptions would render that section inoperative at the election of a state legislature.[15] However, it would

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12(cont.) (legislative history must make an extraordinary showing of contrary intention to justify limitation on the plain meaning of the statutory language). The Creditor in this case has made no such showing.

13. Chapter 222.20, Florida Statutes. (JA16).

14. Since there is no indication that Florida has attempted to "opt out" of subsection (f), this Court need not determine whether it would be permissable to do so. Like here, the Court in In Re Bland, 793 F 2d 1172 (11th Cir 1986), declined to find that Georgia had done so and upheld the ruling of In Re Hall, above.

15. A number of courts have recognized that such a result would occur where exemption "exceptions" preclude operation of 11 USC 522(f). See In Re Hall, above, In Re Leonard, above, In Re Pelter, above.

be inappropriate for this Court to authorize such a result inasmuch as it must be assumed that Congress intended that subsection (f) be effective.[16] This Court must construe all provisions of an act to be of effect if at all possible.[17]

Fifth, the Creditor's interpretation of the scope of permissible state exemption definitions has created, in the view of a number of lower courts, a violation of the federal supremacy clause.[18] This issue

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16. See Colauti v Franklin, 439 US 379, 392 (1979) (a statute should not be interpreted so as to render a part inoperative).

17. See United States v Menasche, 348 US 528, 538-539 (1955) (" It is our duty 'to give effect, if possible, to every clause and word of a statute,' (cite omitted), rather that to emasculate an entire section,...").

18. Some courts have cited this violation without detailed analysis. In Re Maddox, 713 F 2d 1526 (11th Cir 1983), In Re Hershey, above. Others have analyzed the issue more fully. In Re Pelter, above, and In Re Storer, above. It appears that this issue need not be addressed and that an independent application of 11 USC 522(f) would resolve the problem as a matter of construction.

arises, as here, where state law deprives the debtor of his exemption by reason of the existence of the judicial lien.[19] Thus, it is said, there is no impairment because there is no exemption.[20] Federal law, on the other hand, provides that a judicial lien which impairs an otherwise

19. Like the opinion in Owen, below, this approach has been approved in In Re Pine, above, and In Re McManus, above.

20. In In Re Owen, 877 F 2d at 47. It appears from the cases, however, that this is an incomplete expression of Florida law. Florida does not deprive a debtor of all right to claim the homestead exemption merely because a lien attached while the property was ineligible for the exemption. See Lamb v Ralston Purina Company, 21 So 2d 127 (Fla 1945), Bessemer v Gersten, 381 So 2d 1344 (Fla 1980). Florida law merely affords such a creditor with a continued remedy against otherwise exempt property if a creditor's lien attached prior to the availability of the exemption.

The remedy afforded a creditor whose lien attaches prior to the homestead right is a product of decisional law, see Pasco v Harley, 75 So 30 (Fla 1917), and does not derive from the language of the Florida Constitution. Art X, Sec. 4, Florida Constitution. (JA13).

available exemption may be avoided.[21] Therefore, if a state law exception for judicial liens is effective, in bankruptcy, a direct conflict with 11 USC 522(f) arises because the provisions can not both be effective. Application of one defeats application of the other. A judicial lien can not be both an impairment to an exemption and an "exception" to the exemption. Resolution of such a conflict in favor of the application of state law is, here, inconsistent with the requirements of the Supremacy Clause.[22] In addition,

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21. 11 USC 522(f)(1).

22. Article VI, Clause 2, provides that state law may not be given effect where to do so would defeat the federal provision. See Hines v Davidowitz, 312 US 52 (1941), see also Exxon Corporation v Eagerton, 462 US 176 (1983) (finding state law pre-emption to occur where compliance with both the state and federal provision was not possible and where state law stood as a obstacle to accomplishment of the full purposes and objectives of Congress).

Here, the lower courts sustained the state created exception for the judgment lien, thereby rendering the federal provision inoperative.

assuming, as we must, that Congress intended subsection (f) to have some effect, allowing state law to prevail would defeat the purposes expressed therein.[23]

Sixth, subsection (f) contains no requirements or inhibitions concerning state exemption laws and those laws remain unaffected by that section outside the context of bankruptcy. Within the context of bankruptcy, subsection (f) provides, for the benefit of debtors, certain limited remedies respecting property which would otherwise be exempt.[24] States are free, at any time, to limit a debtor's exemptions by such means as they choose, other than those which would conflict with 11 USC 522(f).[25]

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23. See Exxon Corporation v Eagerton, above

24. Lien avoidance is a new remedy for debtors under the bankruptcy laws. See note 12, above,

25. See In Re Sullivan, 680 F 2d 1131 (7th Cir 1982) cert den 459 US 992 (1983) (upholding state laws providing less exemptions than Federal law).

The Creditor urges that a state law which preserves judicial liens on otherwise exempt property should be observed and protected through bankruptcy. This position has received little support. It would be inconsistent with the Code and its legislative history if that position were sustained. Affirmance of the decision below can not be done without doing violence to the principles of construction which this Court traditionally observes.[26]

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26. See note 11, above.

II. WHETHER SECTION 522(f) OF THE BANKRUPTCY CODE, WHICH PROVIDES FOR AVOIDANCE OF CERTAIN LIENS ON EXEMPT PROPERTY, WAS INTENDED TO REQUIRE RETROACTIVE APPLICATION OF A STATE EXEMPTION STATUTE TO INVALIDATE A PRE-EXISTING JUDICIAL LIEN.

In furtherance of this contention, the Creditor attempts to analogize or apply this Court's decision in United States v Security Industrial Bank, 459 US 70 (1982).[1] The holding in that case was essentially limited to the conclusion that Congress did not intend that the provisions of 11 USC 522(f)(2), which applies to consensual liens, be applied to liens on specific property created prior to the effective date of the Code.[28]

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27. R. Br. at 30.

28. 459 US at 81-82.

The above holding, then, concludes nothing about the present case. Inasmuch as the Creditor here had no lien until the date the Debtor acquired the property on 27 November 1984, the Code does not receive a retroactive application. Similarly, no 5th Amendment problem arises as there was no pre-existing property right in specific property.[29]

29. In Conard v The Atlantic Insurance Company of New York, 26 US(1 Pet) 386, 442-443 (1828), this Court, in construing Pennsylvania lien law, stated

> "...it is not understood that a general lien by judgment on land, constitutes, per se, a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests, subsequent to the judgment....But subject to this the debtor has full power to sell or otherwise dispose of the land. His title to it is not devested or transferred by the judgment to the judgment creditor....In short, a judgment creditor has not jus in re, but a mere power to make his general lien effectual by following up the steps of the law, and consummating his judgment by an execution and levy on the land."

With respect to judgment liens, Florida has adopted the rule set forth above. In Massey v (cont.)

The thrust of Creditor's argument, or analogy, suggests an application of the United States v Security Industrial Bank to state law. This reasoning fails for similar reasons. State law, both before and after the 6 November 1984 constitutional amendment, provided the Creditor with the same remedy against the property.

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29 (Cont.) Pineapple Orange Company 100 So 170 172 (Fla 1924) where the court states

> "A general lien by judgment on land only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment. A judgment creditor has no jus in re, but a mere power to make his general lien effectual by following up the steps of the law and consummating his judgment by an execution and levy on the land."

See also Gilpen v Bower, 12 So 2d 884 (Fla 1943) wherein the court distinguishes mortgages and judgment liens and concludes that a judgment lien was not a claim upon specific property. See also Nassau Realty Company Inc v City of Jacksonville, 198 So 581, 582 (Fla 1940) (distinguishing judgment liens and liens on specific property); Young v McKenzie, 46 So 2d 184,185 (Fla 1950) (following Massey, above.)

The lien rights were not altered or diminished by virtue of the amendment.[30] Since state law does not provide to the Debtor a lien avoidance remedy, the Creditor's lien is defeated, if at all, only by application of 11 USC 522(f). As a result, neither body of law receives retroactive application.[31]

The retroactivity argument only arises where one overlooks the manner, and point in time, that exemption rights are to be determined. For bankruptcy purposes, that

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30. Article X, Section 4, Florida Constitution (JA13)

31. The Holt v Henley, 232 US 637 (1914) rule, cited at R. Br. p. 30, is not called into play as no pre-code rights are in issue.

Because, under Florida law, the judgment lien creates no interest or estate in specific property, the lien provides the lien holder a remedy only. See note 29, above. Because a property or liberty interest must exist before any due process analysis is warranted, see Perry v Sinderman, 408 US 593 (1972), and the Creditor's lien in this case creates a remedy only, there should be no occasion to conclude that the 5th amendment concerns expressed in United States v Security Industrial Bank, above, would apply.

See also In Re Hinson, 20 BR 753, 757-758 (Bankr D Sc 1982) (construing judgment lien law).

focal point is the date of the filing of petition.[32] On the date of the filing of Debtor's Chapter 7 case, Florida law accorded him his homestead exemption.[33] The Creditor's lien, even though enforceable, could not have barred his right to that exemption because that right was not dependent upon the non-existence of a pre-existing lien such as was involved here.[34] At the time of the filing of the petition the Creditor's lien, under state law, remained as much a remedy as it was on 27 November 1984.

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32. White v Stump, 266 US 310,313 (1924) ("When the law speaks of property which is exempt and of rights to exemptions, it, of course refers to some point of time....The provisions before cited show - some expressly and others impliedly - that one common point of time is intended, and that is the date of the filing of the petition."); In Re Zahn, above.

33. Article XI, Section 5, Florida Constitution. (JA15). See note 3, above.

34. See note 20, above.

Since the Code preceded, by some five years, the Creditor's acquisition of the lien, that lien was acquired with the knowledge of the Code provisions.[35] The Creditor never acquired any vested right to any particular interpretation of the Code provisions, either before or after the acquisition of that lien, and the Code never provided assurances that some future lien would be forever immune from the operation of 11 USC 522(f). Furthermore, an interpretation of subsection (f) which would void a judgment lien such as this one was all the more apparent because state law, whether pre-amendment or post-amendment, never provided that a judgment lien could bar, for all purposes, the

35. See In Re Webber, 674 F 2d 796 (9th Cir 1982) cert den 459 US 1086 (1982) where the court considered consensual liens obtained in the "gap" period following enactment of the Code. There it was concluded that it was not unreasonable to impute knowledge and understanding of the Code to creditors and therefore the court found certain "gap" period security interests to be avoidable.

acquisition of the homestead.[36] Thus, the Creditor knew, prior to acquisition of any lien, that a federal mechanism was in place which provided for avoidance of certain liens and the Creditor also knew that, because of the nature of the Florida homestead exemption, she could, at best, be afforded a remedy against that homestead but could not, by virtue of any judgment lien, bar acquisition of that exemption by the Debtor.[37] Because of the differences in the interests involved and in the their relationship to enactment of the Code, the issues raised in United States v Security Industrial Bank are not implicated in this case and such issues should not serve as a basis for upholding the decision below.

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36. See note 20, above.

37. The homestead character of a piece of property ...arises and attaches from the mere existence of certain facts in combination in place and time. See Estate of W. J. Newman, 413 So 2d 140, 142 (Fla 5th DCA 1982).

CONCLUSION

The decision of the Court of Appeals must be reversed and judgment entered for the Debtor, DWIGHT H. OWEN, avoiding the judgment lien.

Respectfully submitted

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